

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 Adv. Case No. 19-08269-rdd

5 - - - - - x

6 In the Matter of:

7

8 SEARS HOLDINGS CORPORATION,

9

10 Debtor.

11 - - - - - x

12 NG,

13 Plaintiff,

14 v.

15 SEARS HOLDINGS CORPORATION, et al,

16 Defendants.

17 - - - - - x

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1 United States Bankruptcy Court  
2 300 Quarropas Street, Room 248  
3 White Plains, NY 10601  
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5 November 20, 2019

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21 B E F O R E :  
22 HON. ROBERT D. DRAIN  
23 U.S. BANKRUPTCY JUDGE  
24

25 ECRO: SHEA

1 HEARING re Notice of Agenda of Matters Scheduled for Hearing  
2 on November 20, 2019 at 10:00 a.m.

3  
4 Application for Final Professional Compensation in Excess of  
5 Tier 3 Ordinary Course Professional Monthly Cap for  
6 Polsinelli Poughkeepsie Courthouse - 355 Main Street.

7 Objections due by, Other Professional, period: 1/1/2019 to  
8 1/31/2019, fee: #88,350.84, expenses: \$0.00 (ECF 5106)

9  
10 Declaration of Mark A. Gershon in Support (ECF 5107)

11  
12 Motion of Wedy Antoine for Relief from Stay (ECF 4207)

13  
14 Motion of Delia Torres for Relief from Stay (ECF 4550)

15  
16 Adversary proceeding: 19-08269-rdd Ng v. Sears Holding  
17 Corporation et al

18  
19 Debtors' Motion to Dismiss Adversary Complaint (ECF 7)

20  
21 Opposition of Brian Coke Ng to PDS, Inc.'s Motion to Dismiss  
22 (ECF 10)

23  
24  
25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 WEIL, GOTSHAL & MANGES LLP

4 Attorneys for the Debtors

5 767 Fifth Avenue

6 New York, NY 10153

7

8 BY: JENNIFER CROZIER

9 PHILIP L. DIDONATO

10 GARRETT FAIL

11

12 AKIN GUMP STRAUSS HAUER & FELD LLP

13 Attorneys for Official Committee of Unsecured Creditors

14 One Bryant Park

15 New York, NY 10036

16

17 BY: SARA L. BRAUNER

18

19 UNITED STATES DEPARTMENT OF JUSTICE

20 Attorneys for the U.S. Trustee

21 201 Varick Street, Suite 1006

22 New York, NY 10014

23

24 BY: RICHARD MORRISSEY

25

1 ALSO PRESENT TELEPHONICALLY:

2

3 JOHNAHTAN C. BOLTON

4 JULIE C. CURLEY

5 KIMBERLY B. GIANIS

6 TAYLOR B. HARRISON

7 CATHERINE HEITZENRATER

8 HOO RI KIM

9 SHIRIN MAHKAMOVA

10 PATRICK MOHAN

11 BRYAN OBERG

12 JANE E. PEARSON

13 LEE J. ROHN

14 JOHS F. SAUL

15 CHRIS STAUBLE

16 DAVID H. WANDER

17 AISHA AL-MUSLIM

18 ALIX BROZMAN

19 MICHAEL G. LINN

20

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1 P R O C E E D I N G S

2 THE COURT: In re Sears Holdings, Corporation.

3 MR. CARSON: Your Honor, I didn't get an  
4 opportunity to tell you who I was. I think you asked me,  
5 though.

6 THE COURT: Who are -- I'm sorry. Who are you?

7 MR. CARSON: My name is Seth Carson. I represent  
8 Antoine Wedy. I guess he's a Creditor. We have a Title 7  
9 action. We filed a motion --

10 THE COURT: Right. This is in the Sears case,  
11 though, right? Not the Swift case that I just called?

12 MR. CARSON: No, no. In the Sears case, right.

13 THE COURT: All right. Well, I'm doing that one  
14 now.

15 MR. CARSON: Okay.

16 THE COURT: Very well. Okay.

17 MR. CARSON: Our motion has a Docket number from  
18 you guys. It's 4307.

19 THE COURT: Okay. So I have the agenda for  
20 today's omnibus hearing. Why don't we go by that agenda?

21 MR. FAIL: Good morning, Your Honor. For the  
22 record, Garrett Fail, Weil, Gotshal & Manges. There are a  
23 number of items on the agenda today. With the Court's  
24 permission, I'll turn the podium over to my colleague Phil  
25 DiDonato. As a matter of housekeeping, Your Honor, Mr.

1 DiDonato is admitted to New York State, but his paperwork is  
2 still in process for admission to the Southern District.

3 THE COURT: Okay.

4 MR. FAIL: He's been representing the Debtor since  
5 the inception of the case. He appreciates the Court  
6 permitting him to address today.

7 THE COURT: Very well.

8 MR. FAIL: Thank you, Your Honor.

9 THE COURT: Okay.

10 (indiscernible)

11 THE COURT: Okay. Good morning.

12 COUNSEL: Good morning, sir -- Your Honor.

13 MR. DIDONATO: Good morning, Your Honor. For the  
14 record, Phil DiDonato, Weil, Gotshal & Manges for the  
15 Debtors. The first matter on the agenda today is an  
16 uncontested matter. It is the application of Polsinelli,  
17 PC, for first and final application for compensation. I  
18 understand that the counsel is on the line to answer any  
19 questions you may have.

20 THE COURT: Okay. And this application was filed  
21 because Polsinelli exceeded its ordinary course of  
22 professional cap for the month of January 2019. Have there  
23 been any developments on the application? I didn't see any  
24 objections to it. Were there any changes made in light of  
25 discussions with anyone?

1 MS. PEARSON: Your Honor, this is Jane Pearson.

2 I'm a shareholder of Polsinelli. I'm on the line.

3 THE COURT: Yes.

4 MS. PEARSON: We haven't been contacted by anyone  
5 or received any objections.

6 THE COURT: Okay. All right. I have reviewed the  
7 application and based on that review and the lack of an  
8 objection, I will grant the application. Obviously, it's  
9 for a significant amount of money. It's over the ordinary  
10 course of professional cap. On the other hand, it's clear  
11 to me that this was a very busy time for the firm because of  
12 the transformed transaction which had a heavily -- a heavy  
13 real estate-based element to it and that was the primary  
14 focus of Polsinelli's retention. So you could email the  
15 standard order granting the first and final fee application  
16 with schedules A and B which the administrative office or  
17 the courts require. If you don't have a model for that, you  
18 can contact Weil, Gotshal for one.

19 MS. PEARSON: Thank you, Your Honor. May I be  
20 excused?

21 THE COURT: Yes. That's fine. Thanks.

22 MS. PEARSON: Thank you.

23 THE COURT: Okay.

24 UNIDENTIFIED SPEAKER: Okay. Thank you, Your  
25 Honor.



1 MR. DIDONATO: And next on the agenda are two  
2 motions for the relief from the automatic stay. The Debtors  
3 filed an omnibus objection to both of these motions at  
4 Docket Entry 6006. We request that these motions be denied  
5 for the reasons stated in our objection, namely that they're  
6 both predicated on the availability of insurance for the  
7 underlying claims and we demonstrated that there is no  
8 insurance available here. But happy to take these one at a  
9 time, if that's all right with Your Honor.

10 THE COURT: Okay. Well, why don't we take the  
11 motion of behalf of Mr. Antoine first -- (indiscernible)  
12 Antoine -- and I understand that, again, that his counsel's  
13 on the phone? Mr. Carson?

14 MR. CARSON: Yes. This is Mr. Carson.

15 THE COURT: Okay. Good morning.

16 MR. CARSON: Sorry. I had it on mute. Sorry. I  
17 don't want to bother you guys while I was talking.

18 THE COURT: No, that's fine. So this is a motion  
19 for leave from the automatic stay to pursue the pending  
20 district court action in Eastern District of Pennsylvania  
21 against Sears. And I appreciate that you may not be a  
22 bankruptcy lawyer, but in this action, the standard by which  
23 I review a lift stay motion is laid out by the Second  
24 Circuit in *In re Sonnox* 906 F2d 1280 (2d Cir. 1990). And  
25 the multi-fact or test that the Second Circuit lays out

1 there has been addressed by the Debtors in their objection,  
2 and given that, to the extent there is insurance there's a  
3 substantial deductible that would need to be paid first, a  
4 \$5 million deductible.

5 MR. CARSON: It's my understanding it's 5 million.

6 THE COURT: It seems to me that the Sonnax factors  
7 here argue for not lifting the stay. I'll also note that it  
8 is highly unlikely that there will be any meaningful  
9 recovery from non-insurance assets in this case -- in the  
10 bankruptcy case -- for a lengthy period, if ever. Because  
11 it depends on --

12 MR. CARSON: What exactly --

13 THE COURT: -- litigation that has been brought,  
14 but not developed beyond the filing of the complaint which  
15 was, however, based on substantial discovery, against  
16 various former insiders of the Debtors.

17 MR. CARSON: Your Honor, can you explain what that  
18 means? My client is with me, too. I just -- would -- do  
19 you know -- can you -- would you mind explaining what that  
20 means for my client's case?

21 THE COURT: Sure. There are two sources of  
22 recovery in a litigation often. Source one is directly from  
23 the defendant, in this case, Sears Roebuck & Company. The  
24 other source is from potential insurance that the defendant  
25 would have that might cover the claim. All litigation

1 against Debtors, including the litigation that's pending in  
2 the Eastern District of Pennsylvania is stayed by the  
3 automatic stay when a company files for bankruptcy which is  
4 what happened here.

5 The courts will generally lift the automatic stay  
6 if there is insurance and no claim is being sought against  
7 any asset of the Debtors other than insurance proceeds.  
8 And, in fact, I entered an order in this bankruptcy case on  
9 March 1, 2019, authorizing the Debtors to enter into  
10 stipulations like that -- would say the stay is lifted to  
11 pursue pre-bankruptcy litigation on the condition that any  
12 recovery be limited to insurance proceeds.

13 The lift stay motion here doesn't offer to limit a  
14 recovery in that way and the Debtors say that there is a  
15 substantial deductible that you could recover on also. So  
16 unless the limitation is just to available insurance  
17 proceeds, the Debtors' estate would be harmed just by the  
18 cost of defending the litigation and the potential recovery.

19 The second root of recovering here is, as I said,  
20 against the Debtors themselves in the bankruptcy case once  
21 the claim is liquidated. But I was pointing out is that the  
22 cost both to Mr. Antoine and to the Debtors of pursuing the  
23 litigation at this time is, at least for the foreseeable  
24 future, far higher than any recovery that would be obtained  
25 on a claim against Sears, because the only real asset that

1 unsecured Creditors can collect on in this case is recovery  
2 down the road, potentially on litigation claims. So in  
3 terms of spending money to recover against Sears or Sears  
4 spending money to defend against it in a non-bankruptcy  
5 forum, it just doesn't make economic sense. You'd be  
6 spending hundred-cent dollars to collect fractional dollars,  
7 if that.

8 MR. CARSON: And so I think what you're saying is,  
9 the only option that my client has at this point is to wait  
10 until the bankruptcy ends and then attempt to continue the  
11 lawsuit at that time.

12 THE COURT: Or to pursue a claim at that time in  
13 the bankruptcy case itself. Did your client file a proof of  
14 claim in the bankruptcy case?

15 MR. CARSON: We did.

16 THE COURT: Okay. So, I mean, that would be the  
17 other option. And Congress had the stay apply to pre-  
18 petition litigation because of that very calculus and courts  
19 will lift the stay -- and again, the controlling case in the  
20 Second Circuit is the Sonnax case that I mentioned -- but  
21 it's recognized that that's extraordinary relief and the  
22 factors really need to weigh in favor of lifting it. It  
23 normally will be lifted if the recovery is only to be  
24 against insurance and if you want to do that, it can be  
25 lifted for that purpose, but you'd have to waive the

1 recovery in the lawsuit and in the future against Sears.

2 And many parties in this case have done that.

3 Or if you want to preserve the case against Sears  
4 -- it's probably advisable as a business matter, but as a  
5 legal matter it's required -- to wait and see where the  
6 recovery shakes out ultimately through the bankruptcy case  
7 because the Second Circuit does not authorize lifting the  
8 stay in this situation where Sears is paying hundred-cent  
9 dollars to defend the claim and then at the end of the day  
10 those hundred-cent dollars would materially affect adversely  
11 the Debtors' estate because Creditors are actually only  
12 getting fractional dollars.

13 MR. CARSON: I understand.

14 THE COURT: And this is not --

15 THE COURT: I know you're busy --

16 THE COURT: -- this is not special tribunal like a  
17 Workers' Compensation Board or something like that that has  
18 specific expertise with a specific procedural regime that --  
19 these are federal claims. Bankruptcy courts decide federal  
20 claims like this frequently so the other reasons for lifting  
21 the stay wouldn't apply. And I don't get the sense from  
22 this pleading either that this matter is like ripe for trial  
23 and both parties have spent lots of time and effort in  
24 discovery and they're all ready for trial so the only issue  
25 is the trial cost. So --

1 MR. CARSON: No. We didn't have a Rule 16  
2 conference yet.

3 THE COURT: All right. So all of those facts  
4 argue strongly against not lifting the automatic stay.

5 MR. CARSON: I understand.

6 THE COURT: So you should talk over with Mr.  
7 Antoine whether he wants to waive his claim against Sears  
8 except for any available insurance. And the Debtors are  
9 saying, with regard to this claim, there probably isn't a  
10 lot, if any, available insurance. There may be a little.

11 MR. CARSON: Yeah. I think that would be --  
12 waiving the claim, yeah.

13 THE COURT: So anyway --

14 MR. CARSON: I guess like --

15 THE COURT: -- what you --

16 MR. CARSON: -- what you mean is -- by doing that,  
17 it might be waiving the claim entirely.

18 THE COURT: Well, that possible, yes.

19 MR. CARSON: Okay.

20 THE COURT: So anyway, that's something you can  
21 consider and talk about with your client. If you decide to  
22 do it, you could follow through on the procedure that's laid  
23 out in my March 1 order and reach out to the Debtors'  
24 counsel about -- they have a form of stipulation that you  
25 can sign. I'm not telling you you should do it. I think,

1 you know, it really depends on what insurance, if any, is  
2 left, and if there's really none left, then there's no  
3 reason to waive a claim against Sears, obviously.

4 MR. CARSON: Yeah. And I know you guys are busy  
5 so I appreciate you taking the time to explain that so  
6 thoroughly to us. It's much appreciated.

7 THE COURT: Okay. Very well. So I'm going to  
8 deny the motion. It's just a lift stay motion. I'm not  
9 ruling on the underlying claim so the order's just denying  
10 the motion for the reasons stated. The stay will remain in  
11 effect.

12 MR. CARSON: Okay. Thank you, Your Honor. We'll  
13 get off the line.

14 THE COURT: Okay. And just for the record, the  
15 Court's -- the Court authority for my remarks is laid in a  
16 couple fairly recent bankruptcy ST NY cases as well as in re  
17 Mazzeo 167 F.3d 139 142 (2d Cir. 1999) and numerous other  
18 cases that stated the burden is on the movement -- the  
19 initial burden at least -- to show cause under the Sonnax  
20 factors which is extraordinary relief given that the claim  
21 is unsecured. See also in re Residential Capital, LLC, 2012  
22 Bankruptcy LEXIS 3624 which goes through the Sonnax factors  
23 and puts heavy emphasis on the absence of available  
24 insurance. That's bankruptcy ST NY 2012 and see also in re  
25 SquareTwo Financial Services, Corp. 2017 Bankruptcy LEXIS

1 2570 at Pages 12 and 17 through 18 -- Bankruptcy ST NY 2017.

2 Okay.

3 MR. DIDONATO: Thank you, Your Honor. Next on the  
4 agenda is the motion for relief from stay filed by Delia  
5 Torres (indiscernible). It's Docket Entry 4550.

6 THE COURT: Right. And I believe that her counsel  
7 is also on the phone?

8 COUNSEL: (indiscernible) on behalf on Senor  
9 Torres.

10 THE COURT: Good morning.

11 COUNSEL: Good morning.

12 THE COURT: I -- I mean, I'm sure you were  
13 listening on the --

14 COUNSEL: Yeah. I heard. So I'm pretty sure what  
15 will be the judgment (indiscernible). I heard everything,  
16 yes.

17 THE COURT: Okay. I mean, in this motion, you did  
18 state that you'd be prepared to waive the claim against  
19 Sears, but -- or in this case, Kmart. But on the other  
20 hand, Kmart's been very forthcoming in saying there really  
21 isn't any insurance so I'm not sure you want to proceed with  
22 the motion on that basis. I could grant the motion, but it  
23 really wouldn't do your client any good because there's no  
24 insurance.

25 COUNSEL: Okay. And for what is (indiscernible) I



1 know for a fact what's the amount, the debt that will go the  
2 bankruptcy court that's non-insured debt and (indiscernible)  
3 profits. I don't know if that will make any difference or  
4 if it's just a waste of time and --

5 THE COURT: Well, I mean, you have a claim in the  
6 bankruptcy case, but, again, given that the Debtors would be  
7 spending hundred-cent dollars in defending this claim in the  
8 court of Puerto Rico, under the Sonnax factors that I've  
9 just gone through, that would not be appropriate,  
10 particularly given the amount, as I stated, and timing for  
11 any projection of recovery on unsecured claims. Let me just  
12 confirm. This has not been stated in the pleading, but I  
13 have been assuming -- correct me if I'm wrong, that this is  
14 not a matter that's trial-ready or even close to trial.

15 COUNSEL: No, no. It's not.

16 THE COURT: Okay. So -- and --

17 COUNSEL: It's just beginning (indiscernible).

18 THE COURT: Reading the complaint, I gather it's a  
19 personal injury claim.

20 COUNSEL: Yes.

21 THE COURT: And my suggestion is that after the  
22 Chapter 11 plan goes effective you -- and there may be an  
23 objection at some point to your claim -- but I think this is  
24 the type of claim that Debtors often settle, in light of the  
25 recovery that might be available. And, again, it's really

1 in no one's interest to spend a lot of time and money  
2 litigating it because of the very small recovery that's  
3 projected for unsecured Creditors. So you do have avenues  
4 to try to resolve the claim, but it really should be done  
5 through the Debtors' bankruptcy counsel.

6 COUNSEL: All right. Okay.

7 THE COURT: So I will deny this motion also after  
8 having considered the Sonnax factors and I would cite the  
9 same case law that I previously cited on that basis.

10 COUNSEL: Okay.

11 THE COURT: And on this one, I mean, you could  
12 proceed with it and I would grant it actually, because, you  
13 know, there's -- you said that you would limit your recovery  
14 just to insurance, but there's no insurance so it doesn't  
15 make sense to proceed with it.

16 COUNSEL: Yeah. And it means I can't settle at  
17 this time.

18 THE COURT: Right.

19 COUNSEL: Then there's no reason for  
20 (indiscernible) the case until the (indiscernible).

21 THE COURT: Okay. Very well. So I'll ask the  
22 Debtors to submit both orders.

23 MR. DIDONATO: Okay.

24 THE COURT: Okay.

25 COUNSEL: Thank you, Your Honor.

1 THE COURT: Thanks. And I think in the second one  
2 he could say that upon the representation by the Debtors  
3 that there's no available insurance, the movement withdrew  
4 that condition to her motion.

5 MR. DIDONATO: Understood.

6 THE COURT: Okay. So I think the only other  
7 matter is the continued hearing on Mr. Ng's -- that's N-G's  
8 -- adversary proceeding and the motions to dismiss by the  
9 Debtors and by the non-Debtor co-defendants.

10 MR. FAIL: Thank you, Your Honor. Garrett Fail,  
11 Weil, Gotshal, for the Debtors just one more time. One  
12 note. Your Honor, we've been proceeding granting -- you  
13 know, stipulating for relief from the automatic stay for all  
14 parties where there was insurance and the Debtors' view was,  
15 rather than lift -- consent to lift the stay in matters  
16 where we knew there was no insurance and require people that  
17 even were willing to drop the claims, we thought that the  
18 best process would be to keep the stay in place and resolve  
19 those in the claims reconciliation as Your Honor said so  
20 that we don't have default judgments.

21 We were -- there were sometimes multiple other  
22 parties as defendants and rather than default and have  
23 larger claims in the pool, we thought it would just make  
24 sense to settle them later as Your Honor indicated. And  
25 that's why we've taken the position. Just want to put that

1 --

2 THE COURT: Right. No, I think that's makes sense  
3 and if someone questions whether there's insurance or not  
4 you can -- they can bring it before me and I can decide.  
5 But --

6 MR. FAIL: Absolutely. And we've done that.

7 THE COURT: -- it is no reason to -- I wouldn't  
8 say lure people into settling on the belief that there's  
9 insurance when there isn't. So I think that your approach  
10 is the right one.

11 MR. FAIL: Thank you, Your Honor.

12 THE COURT: Okay. So I had held a fairly lengthy  
13 hearing on October 23, 2019, on a number of matters that  
14 were on that day involving Mr. Ng. He was -- he requested  
15 and received permission to appear by phone. I had ruled on  
16 all of the matters except the Debtors' motion to dismiss and  
17 the co-defendants' separate motion to dismiss. That is the  
18 motion by PDX, Inc/National Health Information Network,  
19 Inc's motion to dismiss. And, unfortunately, Mr. Ng who is  
20 on medication, and has, I believe he would acknowledge,  
21 mental health issues, really couldn't last to the end of the  
22 hearing and I broke it off and said I would adjourn the  
23 matter and then give a ruling at that time.

24 So I don't know if there's any more real argument  
25 to be had. We really didn't get to the National Health

1 motion, but I believe that National Health's counsel who's  
2 not here today -- right -- well, or on the phone -- was  
3 content to have me rule just on the papers. So I don't know  
4 if you want to state your appearance, if you have anything  
5 to say after introduction.

6 MS. CROZIER: Yes. Good morning, Your Honor.  
7 Jennifer Crozier, Weil, Gotshal & Manges, for the Debtors.  
8 As we indicated in the last hearing, we're prepared to be  
9 heard on our papers, ready to address any questions you may  
10 have this morning, Your Honor, but otherwise, prepared to  
11 hear your ruling.

12 THE COURT: Okay.

13 MS. CROZIER: Thank you.

14 THE COURT: I do have one question. I had  
15 suggested a way to, perhaps, resolve this, to bring some  
16 closure to everyone on it, which was that the Debtors would  
17 buy Mr. Ng's Workers' Compensation claim for the \$93 and  
18 change. I don't know if he had second thoughts on that and  
19 reached out to you a little about that?

20 MS. CROZIER: As I understand it, Mr. Ng has not  
21 reached out to us with respect to that compromise.

22 THE COURT: All right. And there was no  
23 obligation on his part to do so, and I think I made that  
24 clear to him. All right. So I'll give you my ruling and  
25 then I'll give you the ruling on the National Health claim -

1 - National Health motion to dismiss, excuse me.

2 I have before me a motion by the Debtors to  
3 dismiss the complaint of Brian Koch Ng against them. The  
4 motion is under both bankruptcy Rule 7012 incorporating  
5 federal rules of civil procedure 12(b)(6) for failure to  
6 state a claim under both Rule 8 of the federal rules as well  
7 as to the extent that the complaint is premised upon  
8 allegations of fraud or misrepresentation, Rule 9(b) of the  
9 federal rules. I had outlined to Mr. Ng at the hearing the  
10 standard for my review of such a motion which is generally  
11 laid out in Tellabs, Inc. v. Makor Issues & Rights, Ltd.,  
12 551 U.S. 308 323 (2007), as well as Papasan v. Allain 478  
13 U.S. 265 286 (1986) and Bell Atlantic Corp. v. Twombly 550  
14 U.S. 544 555 (2007).

15 Separately, I had summarized for Mr. Ng's benefit  
16 who was pro se, federal civil procedure 9(b) which requires  
17 that in alleging fraud a party must state with particularity  
18 the circumstances constituting fraud or mistake, although  
19 malice, intent and knowledge and other conditions in a  
20 person's mind may it be alleged generally. I also pointed  
21 out, however, that while intent or knowledge may be averred  
22 generally, the plaintiff must still plead the events claimed  
23 to give rise to an inference of intent or knowledge. See  
24 Devaney v. Chester 813 F.2d 566 568 (2d Cir. 1987).

25 Here, in reviewing the factual underpinnings of

1 the claims alleged in the complaint and giving them all  
2 reasonable inferences as I -- directed by the Tellabs case,  
3 while not counting as a factual allegation your labels and  
4 conclusions and formulaic recitations of the elements of a  
5 cause of action is required by Papasan v. Allain, I have  
6 concluded that the motion should be granted.

7 As far as the Debtors are concerned, your  
8 complaint asserts five causes of action. First, intentional  
9 infliction of emotional distress under New York law, which  
10 would govern all of the causes of action in the complaint;  
11 second, fraud or misrepresentation; third, violation of  
12 Section 349 of the New York General Business Law pertaining  
13 to -- conduct pertaining to consumers, generally; and  
14 actually, count five -- ignoring count 4 which is as against  
15 only the National Health defendants -- negligence.

16 Under New York law, to state a claim for  
17 intentional infliction of emotional distress, a plaintiff  
18 must allege facts sufficient to establish, one, extreme and  
19 outrageous conduct; two, the intent to cause with a  
20 disregard of substantial likelihood of causing severe  
21 emotional distress; three, causation; and four, severe  
22 emotional distress. Pekewicz, P-E-K-E-W-I-C-Z, v Dutchess  
23 County Department of Community and Family Services 187 A.D  
24 3d 99 2d Department (2016) and Brunache v MV Transportation,  
25 Inc, 151 A.D. 3d 1011 2d Department (2017). See also Chanko

1 v. The American Broadcasting Companies, Inc., 27 N.Y. 3d 46  
2 57-68 (2016).

3 Here, based on a close reading of the complaint  
4 and as I questioned Mr. Ng about the complaint at the  
5 October 23, 2019 hearing on the motion to dismiss, it  
6 appears to me that Mr. Ng is basing all of the claims and  
7 causes of action on the following sufficiently pled  
8 accusations. First, he pleads that when he obtained or  
9 fulfilled prescriptions for various medications in 2010, in  
10 two instances he received from the pharmacy medications that  
11 contained warnings or directions that he lays out in  
12 Paragraph 32 of his complaint. He then states that over  
13 eight years later, in August of 2018, in response to an  
14 information request or subpoena directed by New York State  
15 Supreme Court, he received a response that contained  
16 different and additional warnings and cautions and  
17 directions as laid out in Paragraphs 42 through 44 of the  
18 complaint.

19 He alleges without saying how or when that this  
20 information was fraudulently generated or created. In  
21 addition, he alleges in a number of paragraphs, including  
22 Paragraphs 58 through 67 that the health information was  
23 also, not only inaccurate, but also fraudulent in stating  
24 that he was a participant in certain health care plans, as  
25 opposed to simply having a right under Medicaid to coverage



1 for the medicines that he received in 2010.

2 The complaint further asserts that the plaintiff  
3 was damaged by the provision of this information in, I  
4 believe, two ways. First, it is alleged that because of the  
5 information, Mr. Ng is unable or reluctant to submit a claim  
6 for reimbursement from the Workers' Compensation Board.  
7 Quote -- this is from Paragraph 99 -- the plaintiff cannot  
8 in good faith submit a claim to the Workers' Compensation  
9 insurance carrier and knows that inconsistency, discrepancy,  
10 and contradiction in the medical records located at the  
11 defendant's pharmacy, indeed that would be aiding abetting a  
12 fraud. Similarly, in Paragraph 96, he states, the plaintiff  
13 is in need of genuine, reliable, and accurate medical  
14 records from the defendant's pharmacy for verification and  
15 support of all out-of-pocket medical expenses and to receive  
16 his reimbursements from the Workers' Compensation insurance  
17 carrier.

18 I believe it's noteworthy the complaint does not  
19 allege that any such request has actually been reviewed and  
20 turned down because of the information or the lack of  
21 information that -- or lack of accurate information -- that  
22 the complaint alleges was provided. In addition, Mr. Ng can  
23 -- it can be inferred, I believe, alleges in the complaint  
24 that based on his receipt of the information in 2018  
25 pertaining to warnings and cautions, he developed a serious

1 mental condition and reaction. This is laid out in  
2 Paragraphs 53 through 55 of the complaint.

3           The complaint does not allege, however, that the  
4 plaintiff -- the plaintiff's physical and mental reaction  
5 was caused because of his earlier misuse of the medication  
6 that he received in 2018 for lack of proper warnings or  
7 directions, but merely the effect that seeing different  
8 warnings and directions had upon him. Finally, the  
9 complaint alleges -- I believe I can infer -- that the  
10 defendant's incomplete provision of medical records after  
11 being directed to do so by subpoena in the New York State  
12 Court action, which apparently was only for the purpose of  
13 compelling the direction of medical records, also caused the  
14 foregoing serious physical and mental reaction. It appears  
15 clear from the record, however, that the New York State  
16 Court denied a request to hold the Debtors in contempt or  
17 the Debtor/defendants in contempt for failure to comply with  
18 the subpoena. And it appears clear to me also from reading  
19 in the complaint that the 2018 production of medical records  
20 was in the spirit of fully complying with the subpoena.

21           So returning then to the first count against the  
22 Debtors, I conclude that the complaint does not set forth  
23 sufficiently to survive a Rule 12(b)(6) motion -- extreme  
24 and outrageous conduct with the intent to cause or the  
25 disregard of the substantial likelihood of causing severe

1 emotional distress. I also believe that the complaint, as  
2 I've summarized it, does not set forth any causation that  
3 could be proximately attributed to the provision of the  
4 information in 2018. Therefore, the only element that is  
5 sufficiently pled in the complaint is the fourth element of  
6 the cause of action, i.e., severe emotional distress.

7           It is clear to me from not only -- but from the  
8 case law, rather, that I've cited -- that the New York  
9 Courts require truly extreme and outrageous conduct. For  
10 example, allegations of hostility as set forth in the  
11 Brunache case that I've cited, even accepted as true, were  
12 not so extreme and outrageous to raise such a claim and as  
13 laid out in the Chanko case, the New York Court of Appeals  
14 found that a broadcasting network hospital and physician  
15 that allowed non-consensual filming of a patient's treatment  
16 and death in the emergency room was not so extreme and  
17 outrageous to support an intentional infliction of an  
18 emotional distress claim. Here, intent to cause emotional  
19 distress cannot be inferred from the facts as pled, nor is  
20 the conduct as pled extreme and outrageous in any of the  
21 types of fact patterns that are alleged in the complaint.

22           Secondly, count two, as I've stated, alleges  
23 fraudulent doctoring of patient records and/or  
24 misrepresentation. The elements of fraud include, again, an  
25 intent element as well as the who, what, and where of the

1 fraud alleged and reasonable reliance by the plaintiff and  
2 finally, again, damages caused as a result of reliance.  
3 Here, again, the complaint fails to state a cause of action  
4 for many of the same reasons that I've just alleged.

5 Reasonable reliance upon the representation, even  
6 if it were, in fact, false, is simply not established by  
7 this complaint. A reasonable provision in response to the  
8 discovery demand would not have assumed the type of extreme  
9 reaction that would come from Mr. Ng, and one cannot that  
10 that reaction is reasonable. Nor do I believe that he  
11 suffered damages as a result of his reliance on the  
12 representation, given that the representation as quoted lays  
13 out warnings that he does not tie to any particular reaction  
14 other than seeing that it was different than the first one  
15 that he received which also contained warnings and cautions.

16 Moreover, he has not pointed out how the  
17 information was, in fact, false or how there was any intent  
18 which I could even infer to mislead Mr. Ng in the 2018  
19 information that was provided to him. Therefore, the second  
20 claim should be denied for those multiple reasons.

21 Count three of the complaint alleges a violation  
22 of Section 349 of the New York General Business Law, also  
23 known as New York's Deceptive Trade Practices Act. Section  
24 349 as relevant provides in Subsection A and H that to have  
25 a claim under this section one needs to establish deceptive

1 acts or practices in the conduct of any business, trade, or  
2 commerce or on the furnishing of any service in this state.  
3 And in addition to (indiscernible) of action, grant the  
4 attorney general any person who has been injured by reason  
5 of any violation of this section may bring an action in his  
6 own name to enjoin such lawful act or practice, an action to  
7 recover his actual damages, or \$50 whichever is greater, or  
8 both such actions. The court may also award reasonable  
9 attorney's fees and increase the cap of damages on the  
10 defendant willfully, knowingly violated the section.  
11 However, to state a claim under this statute Mr. Ng must  
12 allege that the Debtors' deceptive acts were directed at  
13 consumers, that they are misleading in a material way, and  
14 that he has been injured as a result -- Batista v.  
15 (indiscernible) 223 of Sep 3d 182 191 ST NY (2016).

16 The claim fails, again, for multiple reasons.  
17 First, this is very much a claim centered on the information  
18 that I've already summarized being provided to Mr. Ng alone.  
19 The focus is on him as opposed to consumers or the public in  
20 general, and consequently, the relief sought is deficient in  
21 that regard. There's no allegation of generally deceptive  
22 practices here supported by any factual allegation, with the  
23 exception of a reference in a claim against the non-Debtor  
24 defendants to security breaches which otherwise bear no  
25 relation to any claim referred to in the complaint.

1           So the complaint's count three should be dismissed  
2 solely on that basis, in re Stadt, S-T-A-D-T, v. Fox News  
3 Network, LLC, 17 F Sept2d 312 324 ST NY (2010). In  
4 addition, as I've already concluded based on my review of  
5 the complaint, the complaint fails for the failure to state  
6 a claim on the other two grounds for relief, i.e., it does  
7 appear to me that the acts complained of are, in fact,  
8 misleading in a material way and, in addition, that Mr. Ng  
9 has failed to plead sufficiently proximate cause showing  
10 that he was injured as a result. Again, the only possible  
11 proximate cause here would be a denial of a reimbursement  
12 based on the -- alleged insufficiency of the information  
13 provided to him which has not occurred yet and may never  
14 occur because Mr. Ng has not submitted the information.

15           And, secondly, Mr. Ng's contention that, separate  
16 and apart from that injury which at this point is  
17 hypothetical and not sufficiently predicted in the  
18 complaint, that he reacted physically and mentally the way  
19 he did to information that, on a reasonable basis, would not  
20 cause such a reaction. Lastly, the motion to dismiss seeks  
21 to dismiss the one remaining count against the Debtors which  
22 is negligence. Under New York law a negligence claim is  
23 sufficiently pled if it alleges that the defendant owed the  
24 plaintiff a duty of care, the defendant breached that duty,  
25 and the breach was the proximate cause of the injury --

1       Hersch v. New York Department of Education 2013 NY LEXIS  
2       MISC LEXIS 5079 New York Supreme (2013). See also Lewina v.  
3       Katherine Gibbs School of New York, Inc, 37 A.D. 3d 555 2nd  
4       Department (2007).

5               I've already discussed the complaint's failure to  
6       establish proximate cause and won't repeat that here except  
7       to show that -- except to note that, again, it's not been  
8       established for purposes of negligence. The motion  
9       therefore, will be granted in full so you can send out a  
10      order granting the motion.

11             MS. CROZIER: Thank you, Your Honor.

12             THE COURT: In addition, I had before me  
13      PDX/NIHN's motion to dismiss which was solely on the basis  
14      of a lack of personal jurisdiction not on the merits.  
15      PDX/NIHN which I'll refer to as National Health, or have  
16      been referring as to National Health, moves to dismiss for  
17      lack of a personal jurisdiction pursuant to, again,  
18      Bankruptcy Rule 7012 incorporating this time Rule 12(b)(2),  
19      the Federal Rules of Civil Procedure, contending that it was  
20      not, as a Texas company, properly served for this New York  
21      action.

22             Unfortunately for National Health, given the  
23      nation-wide service permitted under Rule 7000(4)(f) of the  
24      Bankruptcy Code, the only limitation of personal  
25      jurisdiction over a defendant here is the constitutional due

1 process requirement. Given its specific role with respect  
2 to the information that's complained of here, I conclude  
3 that due process is satisfied under that requirement. As  
4 far as the nation-wide service of process point is  
5 concerned, see in re NWL Holdings, Inc, 2011 Bankruptcy  
6 LEXIS 580 at Page 6, Bankruptcy D Delaware (February 24,  
7 2011), in re Deacon Company, Inc, 63 BR 422 430 8 Bankruptcy  
8 ST NY 1999, and Paragraph 7004.07 Collier on Bankruptcy 16th  
9 ed 2019.

10 As far as the constitutional due process minimum  
11 context analysis is concerned, see SPV Osus, Limited v. USB  
12 AG 882 3d 333 343 345 (2d Cir. 2017). That does not  
13 necessarily end the matter, however, because given my  
14 dismissal of the claims against the Debtors and the apparent  
15 lack of any claim over by National Health against the  
16 Debtors there may be a lack of subject matter jurisdiction  
17 here even on a related-to basis under 28 U.S.C. Section  
18 1334(b). However, I'm not prepared to rule on that basis  
19 today because that issue, while it is always an issue that  
20 pertains to the Court's proceeding with litigation, it has  
21 not been sufficiently developed and I will note that the SPV  
22 Osus case takes a very broad view of -- related to  
23 jurisdiction that might, notwithstanding my remarks,  
24 conceivably apply here.

25 It would also appear to me that at this point this



1 is not, as a discretionary matter, a matter that should  
2 necessarily remain in bankruptcy court, as against National  
3 Health alone, so my ruling denying the motion to dismiss on  
4 -- in persona jurisdiction grounds is without prejudice to  
5 any other relief that National Health would seek by way of  
6 either a dispositive motion or a motion to abstain.

7 I will ask you to let National Health's counsel  
8 know of my ruling and they can check the transcript if they  
9 want to confirm it.

10 MS. CROZIER: We'll do that, Your Honor.

11 THE COURT: Okay. Thank you.

12 MS. CROZIER: Your Honor, if I may be heard  
13 briefly?

14 THE COURT: Yes.

15 MS. CROZIER: We have one additional housekeeping  
16 matter that we wanted to address with Your Honor. Mr. Ng  
17 filed a motion to lift the automatic stay. It would allow  
18 him to litigate both a pre-petition action pending in the  
19 Southern District of New York and pursue an unfiled action,  
20 not a posed petition --

21 THE COURT: I thought I denied that last time. Is  
22 this a new one?

23 MS. CROZIER: You denied the motion with respect  
24 to the pre-petition action, but adjourned to a date to be  
25 scheduled by Mr. Ng with respect to the unfiled action and

1 that's at Docket Entry 2721.

2 THE COURT: Okay.

3 MS. CROZIER: Mr. Ng has not yet scheduled for a  
4 stay motion for a hearing and, in fact, has refused to do so  
5 when we've suggested it.

6 THE COURT: Okay.

7 MS. CROZIER: In the interim, Mr. Ng has filed a  
8 proof of claim. That's at Docket Entry 9234 in the amount  
9 of \$10 million and the unfiled action is predicated on the  
10 very same allegations that Your Honor has just --

11 THE COURT: Which I just I ruled on.

12 MS. CROZIER: Yes. And so, despite the fact that  
13 the first stay motion is not set for a hearing today, we  
14 respectfully request that the Court deny the first stay  
15 motion today.

16 THE COURT: Well, I don't really have that  
17 litigation in front of me so I don't think I'm prepared to  
18 do that. However, once the order is entered on the matter I  
19 just ruled on, you could make a motion to do that based on  
20 (indiscernible) and that -- I'm glad you raised this point  
21 because it reminds me that I forgot to say one thing with  
22 respect to the Debtors' motion to dismiss.

23 The Debtors' motion to dismiss also sought to  
24 dismiss the adversary proceeding on the basis that it was an  
25 adversary proceeding instead of brought as a -- in response

1 to a claim objection which had not yet been filed. That, at  
2 times, may be a perfectly legitimate way to manage  
3 litigation. Congress put the onus on debtors to object to  
4 claims and that also gives them, generally speaking,  
5 discretion on when to do that. And therefore, in most  
6 instances, if a plaintiff or claimant tries to jump the gun  
7 by starting an adversary proceeding, the Court will dismiss  
8 it or carry the motion until it's properly heard in the  
9 context of a case.

10 Here, I determined, given the amount of time and  
11 expense generated by Mr. Ng and frankly the higher tenuous  
12 nature of the claims he was asserting, it was better just to  
13 deal with this matter once which I've just done.

14 MS. CROZIER: Understood.

15 THE COURT: And therefore, this is obviously a  
16 ruling that for (indiscernible) purposes pertains to, as far  
17 as I can tell, all of his claims as asserted in the  
18 bankruptcy case and perhaps also as to what they've been --  
19 what -- how they've been asserted in district court. But I  
20 don't know. I don't have that matter before me so you can  
21 make a motion in the future.

22 MS. CROZIER: Thank you, Your Honor.

23 THE COURT: I actually had one housekeeping thing,  
24 too, which was completely unrelated to what we've been  
25 talking about. I have been reviewing and generally granting

1 omnibus claim objections, but the tenth one was confusing to  
2 me and I wanted to just discuss it with you. It's been  
3 clear to me from the other nine what relief was being sought  
4 and the relief that was proposed to be granted in the  
5 proposed order which relies heavily on a schedule that was  
6 also attached to the respective motions, but the tenth one  
7 in the proposed order has language that says that the  
8 Debtors sought to reclassify the administrative secured and  
9 unsecured claims, as provided in the chart.

10 Now in the -- all the other motions, it was clear  
11 to me that you were only reclassifying or disallowing  
12 administrative expense claims under 503(b)(9), so I took  
13 that language out and put in 503(b)(9). But this one, the  
14 chart was broader and included other types and claims --  
15 secured claims, unsecured claims as well as 503(b)(9)  
16 claims. And I just wasn't clear what that was meant to be.  
17 The objection itself just referred to 503(b)(9) claims, I  
18 think, so I don't know why -- I was concerned that if I was  
19 entering that order, somehow I was modifying in addition  
20 claims that had secured as secured claims or general  
21 unsecured claims.

22 MR. FAIL: Thank you, Your Honor. Garrett Fail,  
23 Weil, Gatshal for the Debtors. Appreciate the opportunity  
24 to address your question and to bring to the Court's  
25 attention two other updates with respect to this. First in

1 response to your questions, the goal and the Debtors'  
2 attempt with this schedule was to not confuse the Creditors  
3 and for the Creditors to see the full panoply and the full -  
4 - everything that they've asserted. So Creditors in one  
5 proof of claim asserted 503(b)(9) administrative, secured,  
6 priority of other natures and general unsecureds. Not  
7 everyone did everything, but our goal was, in listing two  
8 rows, was to show what was altered.

9 THE COURT: So --

10 MR. FAIL: And what you'll see, Your Honor -- just  
11 to finish, but not to cut you off --

12 THE COURT: No. Go ahead.

13 MR. FAIL: -- is nothing was changed in the  
14 administrative columns. Nothing was changed in the general  
15 unsecureds, except to increase the 503(b)(9)s. Nothing was  
16 changed in the secured. The objections did not seek to  
17 alter anything other than change 503(b)(9) to general  
18 unsecured and so in the total claim column you'll see that  
19 the total was mashed and what we wanted Creditors to see is,  
20 we were not disallowing. We were simply reclassing, and we  
21 reserved rights in the objection and in the order with  
22 respect to the (indiscernible). We don't believe that the  
23 other --

24 THE COURT: Okay.

25 MR. FAIL: -- the other priority is valid,

1 probably. We probably will challenge the secured piece,  
2 too, except where it's legitimate. The only thing addressed  
3 was 503(b)(9) to the general unsecureds.

4 THE COURT: So what I would like you to do is just  
5 revise the order --

6 MR. FAIL: Certainly.

7 THE COURT: -- to say that it's just under  
8 503(b)(9) and also to say, when there's a reference to the  
9 schedule, say that the 503(b)(9) claims are reclassified as  
10 set forth in the schedule which other than such  
11 reclassification does not affect any other claims. And then  
12 -- of course you have your reservation of rights later so --

13 MR. FAIL: We'll clarify that, Your Honor.

14 THE COURT: Okay. All right.

15 MR. FAIL: And appreciate the opportunity. There  
16 are two other points I just want to bring to the Court's  
17 attention if I may on that.

18 THE COURT: Sure.

19 MR. FAIL: The Debtors will also submit one  
20 additional change. There was reference number 83 for a  
21 claim of the United States Playing Card Company. We had  
22 agreed to adjourn that. Administratively, it didn't get  
23 taken off of the certificates --

24 THE COURT: Okay.

25 MR. FAIL: -- so we'll remove that one.

1 THE COURT: All right. So just -- that's fine.

2 You can revise the schedule to reflect that.

3 MR. FAIL: Thank you. And one more thing I just  
4 wanted to bring to your attention on this. So we filed this  
5 omnibus objection on September 26th. We set an objection  
6 deadline of October 16th in accordance with the Court's  
7 order. We extended the deadline for one week to October  
8 23rd for a number of parties that were looped in on a group  
9 email. The -- we filed a certificate of no objection on  
10 November 8th, weeks after that deadline passed. We allowed  
11 -- and we removed things even where there's questions and we  
12 can address those at a subsequent hearing, but everyone that  
13 we had heard from that wanted to reserve rights, whether  
14 they were late or not, we took off.

15 THE COURT: Right.

16 MR. FAIL: Mr. Wander filed a letter on the docket  
17 subsequent to the certificate of no objection on the 12th,  
18 several days later. He filed a response for a new client on  
19 the 15th, even later than that. So he filed his letter 27  
20 days after the original objection deadline, 20 days after  
21 the extended one. He filed his objection 30 days and 23  
22 days later. The crux is that his client didn't -- his new  
23 client that he didn't represent -- didn't get a notice. We  
24 have an affidavit of service on file since the October 1st  
25 docket, 5288. His client is number 53. It's on Page 53 of

1 that certificate of no objection. He was served by first-  
2 class mail and email. The mailbox rules in place in the  
3 circuit -- we're prepared to address that at a subsequent  
4 hearing. We did not, therefore, remove it and we planned to  
5 proceed -- I wanted to bring it to your attention --

6 THE COURT: I think you should remove it --

7 MR. FAIL: Okay.

8 THE COURT: -- and just reserve all rights --

9 MR. FAIL: That's fine, Your Honor.

10 THE COURT: -- including that it should be on  
11 because they missed a deadline.

12 MR. FAIL: That's fine. With that because this is  
13 megacase and we need --

14 THE COURT: I mean, he's going to make a -- it's  
15 going to be heard by me anyway and I can hear it in the --

16 MR. FAIL: That's why I brought it to your  
17 attention.

18 THE COURT: -- whatever context it should be in.  
19 I mean, if they don't have anything to show lack of service,  
20 then I'll hear it in that context. If they do, I'll hear it  
21 in that context. If --

22 MR. FAIL: We can address it later. I wanted to  
23 bring it to your attention.

24 THE COURT: -- if you could show that you're  
25 prejudiced by the delay, that'll affect what I would view as



1 a motion to reconsider the entry of the order as to his  
2 client. You know, so I think it's better just to take it  
3 off and say that this doesn't indicate that I've found his  
4 objection to be timely. Just that we'll deal with it in a -  
5 -

6 MR. FAIL: That's fine. We intend to pursue to  
7 mailbox rule and the service. His declaration state of it  
8 and I don't think he'll be able to overcome it.

9 THE COURT: Right. But then -- I mean, I expect -  
10 -

11 MR. FAIL: We'll address it later.

12 THE COURT: -- in response to that, he'll say,  
13 okay. Then it should be considered under 502(j) and Rule  
14 9023 and --

15 MR. FAIL: We'll address it then.

16 THE COURT: -- we'll deal with it then.

17 MR FAIL: Thank you very much, Your Honor.

18 THE COURT: Okay. Thank you

19 (Whereupon these proceedings were concluded at 11:24 AM)  
20  
21  
22  
23  
24  
25

I N D E X

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski  
Hyde  
DN: cn=Sonya Ledanski Hyde, o, ou,  
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Date: November 25, 2019

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